87-1200

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, et al.; and
NORMALITE ASSOCIATION, et al.,
Petitioners,

v.

AUBURN UNIVERSITY; et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The court of appeals held that the district judge should have been disqualified under 28 U.S.C. § 455, on the basis of two grounds which were raised for the first time on appeal and a third ground which had been raised and rejected in the district court. The following questions are presented:

1. Whether a school desegregation defendant whose pretrial attempt to disqualify the black district judge on the basis of his race was denied should be allowed to assert new grounds for recusal for the first time in the court of appeals based on the public record of the judge as a state legislator, which was known to the defendant before the trial began, in order to set aside four years of litigation and a ruling that the defendant was perpetuating vestiges of de jure segregation.

2. Whether a court of appeals may order a district judge recused under 28 U.S.C. § 455 based on grounds which were never presented to the district court, and based on documents—such as a newspaper clipping—which were not in the record and never made the subject of a factual inquiry by any court.

3. Whether, as to the one ground for recusal which had been presented to the district court and rejected by it, the court of appeals could reverse without finding an abuse of discretion or plain error, or, for that matter, without referring to the district court's findings at all.

4. Whether, assuming the grounds were timely raised, a judge's prior involvement with public issues as a civil rights lawyer and state legislator necessarily furnishes him with "personal knowledge of disputed

evidentiary facts," so as to require recusal under 28 U.S.C. § 455.

Two of the petitioners, Board of Trustees of Alabama State University and Board of Trustees of Alabama A & M University, also present the following question:

5. Whether the court below correctly held that a state university and its board members have no standing to seek relief from governmental acts which discriminate on account of race and which prevent the university and its board members from meeting their constitutional duty to avoid discrimination.[1]

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[1] Petitioners present the following additional question conditionally, to be considered only if this Court grants certiorari to review the judgment below based on any of the foregoing five questions:

6. Whether the order of the district court, which decided liability but not remedy in this school desegregation case, was an appealable order.

ADDITIONAL PARTIES IN THIS COURT AND PARTIES IN THE COURT BELOW

The petitioners in this Court are shown in the caption.[2] The respondents, in addition to Auburn University and its Board of Trustees, are Troy State University and the members of its Board of Trustees, the Board of Trustees of the University of Alabama, the State of Alabama, the Governor of the State of Alabama, the Alabama State Board of Education, the State Superintendent of Education, and the Alabama Public School and College Authority.

In the court below, the petitioners here were all appellees, while the respondents here were all appellants.

The only additional party in the court below was the United States, which was an appellee.

There were several additional parties in the district court which were not parties to the appeal in the court below and are therefore not understood to be parties in this Court.

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[2] Two of the petitioners are groups who intervened as plaintiffs in the district court, and who are identified in this caption by the name of the first member of the group. The John Knight group of intervenors also includes Catherine Coleman, Charles R. Anderson, Alma S. Freeman, John T. Gibson, Susan Buskey, Carl Petty, Tamara L. Knight, and Dennis C. Barnett. The Normalite Association group of intervenors also includes the University Legal Defense Fund.

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CITATIONS TO OPINIONS BELOW

The decision of the Court of Appeals is reported at 828 F.2d 1532 (11th Cir. 1987), and is reprinted in this Petition at App. 1a. The district court decision denying the motion to recuse is reported at 582 F. Supp. 1197 (N.D.Ala. 1984) (Senior Circuit Judge David W. Dyer), and is reprinted at App. 41a.

The district court's decision on the merits (which does not deal with recusal but does deal with whether several of the petitioners have standing to raise 14th amendment claims) is reported at 628 F. Supp. 1137

(N.D. Ala. 1985) (Clemon, J.), and is reprinted at App. 62a. In deciding the issue of standing to sue, the decision below referred to an earlier court of appeals decision in this case, which is reported at 791 F.2d 1450 (11th Cir. 1986), cert. denied, 94 L.Ed.2d 144 (1987), and is reprinted at App. 139a.

The Appendix materials are reprinted in a separate volume filed with this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1987. On December 29, 1987, Justice Stevens extended the time for filing this petition to January 19, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved in this case, 28 U.S.C. § 455, is reprinted at App. 160a. The constitutional provisions involved in this case, the Supremacy Clause and the Equal Protection Clause, are reprinted at App. 158a.

STATEMENT OF THE CASE

This petition arises from attempts by two of the respondents (Auburn University and the State Superintendent of Education) to remove a black district judge from a suit to desegregate the public colleges and universities of Alabama. After failing in their efforts to remove the judge before trial, and after a month-long trial had resulted in a ruling finding significant vestiges of *de jure* segregation in Alabama's

system of higher education, one of the respondents, Auburn University, raised two new grounds for recusal in the court of appeals. The court of appeals ruled on the two new grounds, held that the district judge must be recused under 28 U.S.C. § 455, vacated his finding of liability, and ordered a new trial. The court of appeals also held that petitioners Board of Trustees of Alabama State University and Board of Trustees of Alabama A & M University lacked standing to be plaintiffs.

The case overall has a long procedural history, but the facts relating to these issues are relatively uncomplicated. In 1983 the United States filed this suit to eliminate the vestiges of *de jure* segregation in the public colleges and universities of Alabama. The defendants were the State of Alabama, various state education agencies and officials, seven traditionally white universities, and two traditionally black universities (Alabama State University and Alabama A & M University).

The case was assigned randomly to U.S. District Judge U.W. Clemon, sitting in Birmingham. Judge Clemon is black.

Petitioners Alabama State University and Alabama A & M University, conceding the allegations of the United States and recognizing their constitutional obligation to avoid racial discrimination, moved successfully to be realigned as party plaintiffs rather than defendants. In addition, two groups of private citizens (the Knight intervenors and the Normalite intervenors) also intervened as plaintiffs.[3]

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[3] The Normalites' intervention was limited to participation in the remedy phase of the case.

On September 6, 1983, respondent Auburn University filed a motion to disqualify Judge Clemon. The State Superintendent of Education joined in the motion. After a hearing, Judge Clemon denied the motions. Auburn petitioned the 11th Circuit for a writ of mandamus, which was granted, in part, to the extent of directing that the motions to recuse be heard by another judge.[4] The motions were ultimately assigned to Senior Circuit Judge David W. Dyer.

One of the alleged grounds for recusal was that Judge Clemon had minor children who might be members of a class affected by the outcome of the litigation; some of the other grounds related to Judge Clemon's participation in several prior civil rights cases. There were no allegations that anything in Judge Clemon's legislative record warranted recusal. Neither the State of Alabama, the Governor, nor any of the six other defendant universities joined the motion for recusal.

Following a hearing, Judge Dyer denied the motions to recuse in an exhaustive order analyzing each argument raised first under 28 U.S.C. § 144 and then under § 455. He found that the allegations raised no suggestion of bias or the appearance of bias; instead, as Judge Dyer found, they appeared to raise only the

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The defendants named in the United States complaint were the actual institutions or agencies. In order to avoid 11th amendment problems, the new plaintiffs named as additional defendants the Board members of some of the institutional defendants, sued in their official capacities.

[4] On remand the motions to recuse were initially assigned to Hon. H. H. Grooms, who first granted the motions and then vacated his order and recused himself. App. 12a, 60a.

suggestion that a black judge cannot fairly hear or decide a civil rights case:

> "The question underlying the allegations in the present affidavits is whether a black judge should be disqualified *per se* from adjudicating cases involving claims of racial discrimination." App. 49a.

Judge Dyer held that allegations of this sort are not grounds for recusing a judge:

> "A claim that is essentially an allegation based on the judge's background and which states no specific facts that would suggest he would be anything but impartial in deciding the case before him is insufficient." App. 48a.

One of the grounds that Judge Dyer dealt with in detail was the claim that Judge Clemon's participation in the case of *Lee v. Macon County Bd. of Education* should disqualify him because it gave him access to disputed evidentiary facts relevant to the present case. As Judge Dyer recognized, *Lee v. Macon* was an omnibus school desegregation case which had been split into more than 100 separate actions before Judge Clemon became involved in two small parts (involving elementary and secondary schools in Sumter County and Anniston) that had nothing to do with higher education. App. 54a. Judge Dyer found as a fact that Judge Clemon's involvement in *Lee v. Macon* was not the same "matter in controversy" under § 455(b)(2), and that Judge Clemon did not have access to "disputed evidentiary facts" under § 455(b)(1). App. 55a.

Auburn moved to reconsider Judge Dyer's decision or, in the alternative, to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Judge Dyer denied this motion on March 28, 1984. Auburn did

not petition again for a writ of mandamus or take any other steps on the recusal issue at that time.

The case returned to Judge Clemon. There followed fifteen months of extensive discovery and pretrial proceedings until the trial began on July 1, 1985. It ended on August 2, 22 trial days and 8043 transcript pages later.

The district court entered its findings on liability on December 9, 1985, finding that in many respects there were still vestiges of the dual system of higher education. In other respects, the district court found no liability. The district court scheduled the beginning of remedial proceedings and directed the State and its higher education commission to submit specific desegregation plans. App. 137a.

The principal respondents moved to certify the December 9 order for interlocutory appeal, which the district court denied. They nonetheless filed notices of appeal, asserting this time that the December 9 order was in fact appealable.

On appeal, Auburn advanced two new grounds for recusal, based in each case on a document that was not in the record. The first new ground was that as a State Senator in 1977, Judge Clemon had opposed the appointment of Thomas Radney, who is white, to the Alabama State University Board of Trustees. This new ground for recusal was based on a 1977 newspaper clipping which Auburn boldly attached to its 25-page notice of appeal, and which it thereafter included as an "attachment" to its appellate brief. The clipping was not in the record, petitioners repeatedly objected to its use, and Auburn never explained how it could seek to rely on it. The second new ground

was that as a State Senator in 1978, Judge Clemon had been one of seven co-sponsors of a bill (which did not pass) to appropriate $10,000,000 for capital improvements at Alabama A & M University. This ground was likewise based on a document that was not in the record—a page of the 1978 Alabama Senate Journal—but was also an "attachment" to Auburn's brief in the court of appeals.

No record was ever made about when Auburn had obtained these documents, or how it justified sitting on these grounds for more than a year until the very point when the notice of appeal was filed and the case left the district court's jurisdiction. Auburn's brief stated that it had obtained the newspaper clipping in June 1984, and had obtained the other document "after" Judge Clemon's December 9, 1985 order.[5] Whether either of these statements was correct was never determined.

The court of appeals stayed all proceedings pending appeal. After briefing and argument, the court of appeals issued its decision on October 6, 1987.

The court of appeals decision. The heart of the court of appeals decision dealt with the recusal issue.[6] The

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[5] Auburn conceded that it had known of the proposed appropriations bill several months before the trial, and a year and a half before advancing it as a ground for recusal; its claim was simply that it was unaware until "after" December 9, 1985 (how long "after" it did not say), that Senator Clemon was one of the sponsors.

[6] The court of appeals decided a number of other issues. It held the liability finding of December 9, 1985, was an appealable order, a holding which petitioners seek to review only if this Court grants certiorari as to the recusal or standing issues. The

court first rejected all but one of the arguments advanced by respondent in the district court, and held that Judge Clemon's background as a civil rights lawyer did not disqualify him. The court of appeals went on, however, to address on the merits the two new arguments first raised on appeal, and here the court of appeals made original findings of fact on the basis of which it held the district judge must be disqualified.

The court of appeals did not hold that Judge Clemon had a "personal bias or prejudice concerning a party." within the meaning of 28 U.S.C. § 455(b)(1), or that he had an interest or other disqualifying connection within the meaning of § 455(b)(2)-(5), but held instead that Auburn's new documents proved Judge Clemon had had "personal knowledge of disputed evidentiary facts concerning the proceeding," and must therefore be disqualified. App. 27a-28a.

The first finding on which this holding rested was that as a State Senator, "Judge Clemon shaped the composition of these governing boards by acting along with other members of his committee to prevent nominations from reaching the Senate floor." The basis for this finding of the court of appeals was apparently the extra-record newspaper clipping, about which the court said: "For example, press accounts indicate that Judge Clemon was instrumental in preventing the confirmation of Thomas Radney to the Board of Trustees of ASU and that Judge Clemon opposed the

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court of appeals held that the claims under Title VI of the Civil Rights Act of 1964 could not stand without program-specific pleading and proof, and it held that the United States could not sue under the fourteenth amendment. The court also held that the university petitioners lacked standing, an issue which is discussed further below.

nomination on the explicit grounds that Radney's confirmation would have created a white majority on the ASU board." App. 24a. There was no record to support these press accounts, but the court of appeals made a finding that Judge Clemon "actively participated in the very events and shaped the very facts that are at issue in this suit."

Turning to the A & M appropriation bill, the court of appeals found that Judge Clemon was a co-sponsor of the bill, a finding which was apparently based on the Senate Journal page which was not in the record. App. 25a. The court of appeals proceeded from there, however, to make a finding of fact that "the stated premise of this bill was that the facilities of A & M where inferior to those of the historically white universities." This finding is not only not supported by any record, but is flatly contradicted by the record, by the description of the bill contained in Auburn's extra-record Senate Journal page ("S. 387. To appropriate from the Special Educational Trust Fund the sum of $10,000,000.00 for the fiscal year ending September 30, 1979, to finance certain capital improvements at Alabama Agricultural and Mechanical University in Huntsville, Alabama."), and by the text of the bill itself. *See* S. 387, Jan. 17, 1978 (Alabama Dept. of Archives and History). Finally, the court of appeals made findings that Judge Clemon helped "spearhead" the bill, and that its failure was "despite then-Senator Clemon's best efforts to gain passage of the bill." The source of these findings is likewise a complete mystery since they do not appear to have any basis in the record or in the extra-record document.

The court of appeals then turned to Judge Clemon's involvement in the *Lee v. Macon* case. Without mentioning Judge Dyer's ruling to the contrary, the court of appeals proceeded to substitute its own finding that Judge Clemon *did* have extrajudicial knowledge of disputed facts from *Lee v. Macon* that "concern[ed] the proceeding," i.e., this higher education case. App. 26a-28a. This finding was based on the introduction in the month-long trial of a single exhibit, out of thousands, showing undisputed facts concerning decreases in the number of black high school principals during a number of years. The specific document to which the court of appeals referred was a published report entitled "The Slow Death of the Black Educator in Alabama," which had been cited by the Fifth Circuit in 1971 in a *Lee v. Macon*-captioned case involving the Muscle Shoals School District (in which Judge Clemon had not been involved). *Lee v. Macon County Bd of Education (Muscle Shoals)*. 453 F.2d 1104, 1110 (5th Cir. 1971). The court of appeals apparently reasoned that the failure to exclude this exhibit as irrelevant in the trial of this higher education case showed that all the *Lee v. Macon* cases dealing with elementary and secondary education must be the same case as this higher education case.

The court of appeals did not address the fact that the two principal grounds for recusal had not been presented to the district court at any time,[7] and were

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[7] The court of appeals characterized petitioners' argument as objecting to the new grounds because "they were not presented to Judge Dyer," App. 24a-25a, at n. 49, but as each of the petitioners' appellate briefs made clear, the objection was to Auburn's silence during the 22 months that the case remained in the district court *following* Judge Dyer's decision.

not based on any record. The court of appeals treated the unorthodox procedures as simply raising a question of the timeliness of Auburn's arguments, and its resolution of that question also rested on findings of fact made without support.

First suggesting that there might be no timeliness requirement at all, the court of appeals then held that it would be inappropriate to apply a timeliness requirement "under the circumstances of this case." App. 24a-25a, at n.49. In so holding the court noted that those courts adopting a timeliness requirement have done so to prevent litigants from abusing motions to disqualify as dilatory tactics, and it then made a finding of fact that "appellants here were not acting to delay or to speculate on a favorable substantive judgment in the interim." This finding was based on the following critical subsidiary finding:

> "Appellants did not discover relevant information about Judge Clemon's activities as a legislator until late in the litigation and raised this ground for disqualification at the first available moment." App. 24a-25a, at n.49.

There is no record or extra-record basis for this finding of fact. Indeed it is contradicted by Auburn itself, which said in its court of appeals brief that it obtained the newspaper clipping in mid-1984, a year before trial.

Having found that Judge Clemon should be disqualified, the court of appeals went on to order a new trial. App. 29a.

Standing of petitioners Alabama State University and Alabama A & M University. The opinion below also held that the two state institutions and their

boards of trustees lacked standing to assert fourteenth amendment claims. In doing so, the court of appeals did not detail its reasons anew, but referred to its earlier decision in this litigation where those reasons were spelled out. App. 5a, at n.1. That earlier decision was an appeal from a preliminary injunction obtained by petitioners Alabama State University and the Knight intervenors shortly after the trial but before the order of December 9, 1985.

In that earlier appeal, the court of appeals upheld the injunction insofar as it had been requested by the Knight intervenors, but reversed it as to Alabama State University on the ground that Alabama State University lacked standing. App. 139a.

In reaching its earlier decision, the Court of Appeals relied on a line of cases in this Court and in the former Fifth Circuit which, it said, "stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator." App. 142a. The court of appeals did not address in either case the argument that the Boards of Trustees of Alabama State University or Alabama A & M University could raise claims either as representatives of their students and faculty, or in pursuance of the board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land. It cited none of the cases in other circuits which have explicitly held that a school board or school district may raise such claims, and it disposed in footnotes of this Court's controlling decisions in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Wash-*

ington v. Seattle School District No. 1, 458 U.S. 457 (1982). App. 144a, at n.2, and 146a, at n.5.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. RECUSAL

The decision below takes a significant step in the wrong direction. By entertaining grounds for recusal which were raised for the first time in the court of appeals, based on extra-record documents, and without requiring a factual inquiry into either the allegations themselves or why they were held back from the district court, the lower court's decision conflicts with decisions in at least the Second, Fifth, Sixth, and Ninth Circuits, and opens the door for manipulation by litigants that threatens public confidence in the courts.

Moreover, the decision below threatens to create a dual standard by which a black judge has been recused for grounds not fairly distinguishable from those which have been held insufficient in motions to recuse white judges. Finally, the decision operates to reward a litigant whose claim seems to be that black judges cannot be fair in civil rights cases, while jettisoning four years of effort by the United States and black citizens to seek meaningful desegregation in higher education in Alabama.

This Court has recently granted certiorari and heard argument in a case where a motion to recuse was filed late in the proceeding. *Liljeberg v. Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986), cert. granted, No. 86-957 (O.T. 1987). The instant case raises many of the same concerns as are involved

there, with three important additions: here, unlike *Liljeberg*, (1) it appears that the party seeking recusal engaged in deliberate delay, (2) when the questions were raised, there was no remand for full development of a record in the district court so that a decision could be made, as it must be under § 455, based on facts, not conjecture, and (3) it appears that the judge's race motivated the motion to recuse.

1. The Procedures Allowed Here Reward Manipulation and Abuse of the Judicial Process.

Congress and the courts have wrestled with the need to administer judicial disqualification procedures in such a way as to maintain public confidence in the fairness of our judicial system. The adoption of the 1974 amendments to 28 U.S.C. § 455, which decreased the subjectivity of the process, was a major step in that direction. While judges no longer should assume a "duty to sit," however, it is equally important that judges not be removed for reasons that are speculative or, more critical, manipulative. Preventing litigants from manipulating the process is achieved largely by requiring orderly procedures, including a requirement that motions not be unduly delayed and a requirement, as to § 455 applications, that allegations be supported by a sufficient factual record. Those procedures have been applied in other circuits.

The decision below conflicts in a number of respects with the decisions of other circuits which have adopted procedural rules to prevent abuse of 28 U.S.C. § 455. In allowing a litigant to raise new grounds for recusal without time limit, the decision below is in conflict with decisions of the Second Circuit, *In re International Business Machines*, 618 F.2d 923, 932 (2d Cir.

1980), the Fifth Circuit, *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982) and the Ninth Circuit, *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). The Fifth Circuit explained why timeliness is so important:

> "Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation strategem. Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage." 666 F.2d at 121.[8]

In deciding to entertain a newly raised ground for recusal (and make its own findings) without remanding to give the district court the first opportunity to rule and the critical opportunity to create a record, the decision below is in conflict with the Fifth Circuit, *Liljeberg v. Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986), the Sixth Circuit, *Price Bros. Co v. Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980), *cert. denied*, 454 U.S. 1099 (1981), and the Ninth Circuit, *United States v. Conforte*, 457 F. Supp. 641, 645 (N.D. Calif. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980). In *Conforte*, a case strikingly like the instant case, an ap-

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[8] The major exception to the insistence on timeliness is the Seventh Circuit, which recognizes that it "stands alone" and appears to be ready to reconsider. United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

pellant claimed that newly discovered evidence warranted recusal of the district judge and reversal of the judgment. Following a remand for an evidentiary hearing on both the timeliness and the sufficiency of the motion, the Ninth Circuit, in an opinion by Judge Kennedy, held a recusal ground untimely where the appellant had failed to move promptly in the district court after receiving knowledge which—even though incomplete—should have put him on notice of a possible ground for recusal. 624 F.2d at 879.

Finally, in deciding to grant retroactive relief of a new trial, especially where it appears the moving party has failed to move promptly, the decision below is in conflict with the Sixth Circuit, *Leaman v. Ohio Dept of Mental Retardation*, 825 F.2d 946, 948 (6th Cir. 1987), and the Seventh Circuit, *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). *But see Liljeberg v. Health Services Acquisition Corp., supra.*

The above list of procedural conflicts between the court below and other circuits is of course an incomplete description, since the lower court's basic error was resting a disqualification order on a litigant's assertions which were both out of order and untested, and supporting that disqualification order with crucial determinations which should more properly be called "surmises" than findings of fact, since they were so devoid of any record support. In this respect the lower court was obviously at variance with every other court which has dealt with Section 455.

In that posture, it is hardly surprising that the court of appeals repeatedly made findings of fact the source of which remains an utter mystery, as well as other findings of fact which are plainly erroneous.

The problems go well beyond the obvious mistake of relying on Auburn's fugitive newspaper clipping. Thus, for example, in the court of appeals' four sentences describing then-Senator Clemon's connection with the A & M appropriation bill, App. 25a, virtually every statement beyond the fact that he was one co-sponsor of a bill to appropriate $10 million for Alabama A & M is either simply unsupported or is manifestly incorrect. The same plain error infects the court of appeals' statement that Auburn "did not discover" the relevant facts "until late in the litigation" and raised them "at the first available moment."

The procedural rules fashioned by the court of appeals have serious consequences far beyond this case. Just as motions for recusal can promote justice, they can be used to defeat it as well. In this case, while the absence of any record makes it difficult to discuss the facts, it was conceded in Auburn's brief (which is not part of the record) that the newspaper clipping about the Alabama State University Board member was in its hands by mid-1984, and remained there for eighteen months until the moment the case left the district court's jurisdiction. The conclusion is inescapable that Auburn, having been unsuccessful before two judges in the district court, deliberately withheld the document until it could try a new forum.

In this case, the court of appeals departed from the salutary rules followed by other circuits, proceeded without a record to find that Auburn's new grounds were timely[9] and again without a record that

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[9] Petitioners also question (as we did in the court of appeals) whether it was timely to raise in the appeal even the grounds which had been presented to Judge Dyer. The Seventh Circuit's

they were sufficient to meet the standards of 28 U.S.C. § 455. Nothing could have been more destructive of Congress' goals in passing the carefully crafted judicial disqualification statutes, or, in this case, more destructive of the public's confidence that a randomly selected judge will not be removed from a civil rights case because of his race.

2. The Allegations Relied on By the Court of Appeals, Even if Judged on the Merits, Do Not Support Recusal.

In the district court, Judge Dyer's careful examination of Auburn's grounds for recusing Judge Clemon showed that those grounds boiled down to assertions that Judge Clemon could not fairly judge a civil rights case because he is black, and because he was active as a citizen and a lawyer in seeking to achieve full civil rights for all people regardless of race. Judge Dyer rightly rejected those offensive suggestions. The two new grounds raised in the court of appeals, growing out of Judge Clemon's service as a State Senator, stand on no stronger footing.

It is true of course that prior activities as a lawyer or as a state legislator create the possibility that one may become involved in episodes or relationships which would require recusal in a given case, but the specific facts shown here reveal no activities or relationships that meet the statutory tests, and Auburn never attempted to show such specific facts.

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rule requiring that review of orders denying recusal be by a prompt petition for mandamus, Union Carbide Corp. v. United States Cutting Service, Inc., 782 F.2d 710 (7th Cir. 1986), has special force in this case, where Auburn obviously knew the way to the court of appeals by mandamus since its first petition had been granted.

The court of appeals made no finding that Judge Clemon had "a personal bias or prejudice concerning a party," but instead rested its decision on the other prong of § 455(b)(1), that he had "personal knowledge of disputed evidentiary facts concerning the proceeding." An examination of the three grounds, however, makes it clear that there was no showing of personal knowledge of disputed evidentiary facts nor of any other disqualifying ground under 28 U.S.C. § 455.

As to the first ground, Judge Clemon's role as a lawyer in *Lee v. Macon*, Judge Dyer exhaustively surveyed every aspect and found as a fact that *Lee v. Macon* was distinct from this case. He concluded that "even applying the objective standard of § 455(a), a reasonable man knowing all of the circumstances would not believe Judge Clemon's involvement in *Lee v. Macon* could have provided him with personal knowledge of disputed facts or otherwise create a doubt as to his ability to remain impartial." App. 55a.

As the cases recognize, review in the court of appeals of a district court decision on recusal is governed by strict standards, requiring that facts found by the district court be accepted unless plainly erroneous,[10] and that the district court decision overall be affirmed unless found to be an abuse of discretion.[11] The tests for overturning a district court de-

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[10] In re City of Houston, 745 F.2d 925, 927 (5th Cir. 1984); Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 324 F. Supp. 1371, 1385 (S.D. Tex. 1969), aff'd, 441 F.2d 631, 633 (5th Cir.), cert. denied, 404 U.S. 941 (1971); Anderson v. City of Bessmer City, 470 U.S. 564 (1985).

[11] In re City of Detroit, 828 F.2d 1160 (6th Cir. 1987); Mayberry v. Maroney, 558 F.2d 1159, 1162 (3d Cir. 1977).

cision were not remotely met here, and the court of appeals did not say they were.[12]

The two grounds relating to the incidents while Judge Clemon was in the State Senate are no different, precisely because Auburn eschewed the opportunity to prove that a disqualifying ground did exist, not simply that it could have existed. Unquestionably, legislators are often involved in activities or relationships that may bear on issues they later encounter as judges, but because so many judges come from legislative backgrounds, courts must be especially careful to review the details of the particular activity or relationship to make certain that a judge is not being recused simply because of his prior legislative position.

In this case, the facts actually shown (even including the extra-record material) do not warrant recusal. Auburn's grounds based on Judge Clemon's State Senate position involved two of the most common functions of a state legislator, passing on executive nominations and appropriating money. If, as alleged, Judge Clemon during his several years in the State Senate voted on nominees to various boards, including the boards of state universities, and if he did in that capacity oppose a particular nominee for the Alabama State University Board, the mere fact of that opposition is not enough to require recusal. While there

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[12] The court of appeals placed great reliance on the exhibit introduced at trial which had been cited in an earlier Lee v. Macon opinion (Muscle Shoals) (in which Judge Clemon had not been involved). This remote and minor matter was clearly insufficient either as supposedly new evidence not available to Judge Dyer or as an indication that he had been plainly erroneous in finding the two cases to be distinct.

might be additional facts concerning this incident, Auburn made no attempt to bring them out, but instead made certain that there would be no opportunity to make any inquiry.

Likewise, if Senator Clemon did co-sponsor a bill to provide funds for Alabama A & M, that is hardly different from what legislators do every day, and is far from a ground for recusal. Again, Auburn presented no additional facts concerning Judge Clemon's efforts on behalf of this bill that would warrant recusal. It is true that the court of appeals found such additional "facts," which it apparently thought were critical, but those "facts" appear to have had no basis whatever, even in Auburn's extra-record documents.[13]

The prior careers of the men and women who become our judges are commonly in public life. Courts have been especially careful to insist that a judge's *nearness* to issues later encountered on the bench, without proof of an actual connection to those issues, is not enough to disqualify. This has been the rule in numerous cases. *E.g., McGrath v. Kristensen*, 340 U.S. 162 (1950); *Laird v. Tatum*, 409 U.S. 824 (1972); *Curry v. Baker*, No. 86-7639 (11th Cir. Sept.

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[13] As to all three grounds, the particular facts of which Judge Clemon is supposed to have had personal knowledge appear to be facts in the public domain, and the court of appeals never explained how they were disputed, i.e., how the racial composition of the boards of trustees, the decline in the number of black school principals, and the fact that A & M had sought capital funding (all of which were undisputed) could constitute "disputed evidentiary facts concerning the proceeding" within the meaning of 28 U.S.C. § 455(b)(1).

24, 1986);[14] *Parrish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975).

In the *Parrish* case, and in a number of others, *e.g., Phillips v. Joint Legislative Comm.*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982), motions to recuse white judges accused of racial prejudice have been denied for lack of a specific showing of actual bias or reasonable appearance of bias. The grounds on which the district judge was ordered recused in this case are not sufficiently distinguishable from the grounds rejected in some of the above cases to prevent the appearance of a dual standard based on a judge's race.

II. PETITIONERS' STANDING

As to the standing issue, the writ of certiorari should be granted because the court of appeals decision denying the university petitioners' standing is in conflict with a recent decision of the Fourth Circuit, *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308, 1310-11 (4th Cir. 1987), as well as with decisions of the Second Circuit, *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*,

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[14] In Curry v. Baker, one of the panel members in the court below expressed this view in rejecting a recusal motion based on his longtime service as Chairman of the Alabama Democratic Party. He noted that "at least in this region of the United States, judges who do not have a background of active political participation are the exception rather than the rule," and indicated that if judges were easily subject to challenge based on their prior political background, the great danger would arise that litigants could be in a position to "judge shop" and the "integrity of the entire process [would be] compromised." *Id.* at p.3 (Vance, J.)

414 U.S. 1146 (1974), Sixth Circuit, *Akron Board of Educ. v. State Board of Educ.*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied.* 412 U.S. 932 (1974), Eighth Circuit, *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 99 (8th Cir. 1956), and decisions of this Court itself. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1981); *Board of Education v. Allen*, 392 U.S. 236 (1968).

The court of appeals, relying on its earlier decision, App. 5a, held the Board of Trustees of Alabama State University and the Board of Trustees of Alabama A & M University could not request relief against the State of Alabama or any state agencies or state officials. The earlier decision, App. 139a, relied upon a line of cases holding that disputes between arms or creatures of a State do not normally implicate federal rights. It did not, however, consider the cases in other circuits which have allowed claims such as those asserted here when they were brought by state-created entities or their board members, in pursuit of their obligation under the Supremacy Clause to conform their conduct to the federal Constitution or a federal statute.

In such cases, state-created entities or members of boards of state-created entities have uniformly been allowed to sue to enforce the equal protection clause and similar constitutional or statutory provisions.

Many of the decisions occur, as might be expected, in school desegregation cases. In 1956, the Eighth Circuit recognized the standing of a local school board and its members to sue to allow them to carry out their obligation to obey the Constitution:

> "[P]laintiffs are under a duty to obey the Constitution . . . It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposed duty. The right arises by necessary implication from the imposition of the duty as clearly as though it has been specifically stated in the Constitution." [*Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 99 (8th Cir. 1956).]

The Sixth Circuit has applied this reasoning to hold that a local school board had standing under the Supremacy Clause to challenge a proposed transfer of a portion of its territory to an adjoining school district.

> [T]he Akron Board and its Superintendent have been commanded by action of the state board to participate in conduct leading in the direction of segregation of its school system. Such conduct would place the Board and its members and its Superintendent in the position of violating the Fourteenth Amendment to the United States Constitution. It would subject plaintiffs to being defendants in a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional. At least theoretically it might subject individual members of the Board and the Superintendent to suits for damages under the Civil Rights Act. 42 U.S.C. 1983. [*Akron Board of Education v. State Board of Education*, 490 F.2d 1285,

> 1290 (6th Cir.), *cert. denied*, 412 U.S. 932 (1974).]

Most recently, the Fourth Circuit has reaffirmed its earlier ruling to the same effect. *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308 (4th Cir. 1987).

Similar reasoning has led this Court to recognize a school board's standing to challenge state laws and policies that the board believes will interfere with its duty to support the Constitution:

> Appellees do not challenge the standing of appellants [a local school board and its members] to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing [the relevant state law provisions] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the state law]—that would be likely to bring their expulsion from office and also a reduction of state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation.

Board of Education v. Allen, 392 U.S. 236, 241 n.5 (1968)(citations omitted). The above principles apply fully in this case, where the Boards of Trustees of Alabama State University and Alabama A & M University were not only faced with the threat of suit but were in fact sued.

The lower court's holding is also contrary to this Court's recent decision in *Washington v. Seattle School*

District No. 1, 458 U.S. 457 (1981), which conferred Fourteenth Amendment standing on a local school board to challenge a statewide initiative that divested local boards of their ability to use busing in order to desegregate district schools. The prior decision below dealt with *Seattle* in a footnote, asserting that the *Seattle* case is distinguishable because that decision "does not trench on a state's political prerogatives." App. 145a. Petitioners believe the court of appeals' analysis offers no basis for distinguishing between the situation of the Seattle school board and the Boards of Trustees of Alabama State University and Alabama A & M University. See also *Papasan v. Allain, Governor*, 92 L.Ed.2d 209 (1986).

The above cases typically involve public officials, like petitioners in this case, who have public duties to perform, and who are obligated to comply with the Constitution in their performance of those duties. In this case, for example, the petitioners have personal obligations, which they assume by taking their oaths of office, to avoid discriminating against their students and others. Where petitioners believe that actions of the State or other state officials interfere with the performance of those constitutional obligations, a suit such as this may often be the only way that petitioners will be able to meet those obligations, and may likewise be the only effective way that the constitutional interests of the students can be protected.

The court of appeals analysis, restricted as it was to the conventional relationships between governmental bodies, ignored the Constitutional obligations of public officials. The decision below conflicts with decisions in this Court and other circuits, and leaves a

significant gap in the means of protecting the constitutional rights of our students.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[15]

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[15] Petitioners have conditionally presented the question whether Judge Clemon's December 9 liability ruling was an appealable order. We do not believe that it was, and therefore request that if this Court grants review of the other questions, it consider the appealability question as well. This question is presented conditionally because petitioners are concerned that if this question alone were reached, the result might be simply to vacate the court of appeals decision without deciding anything about recusal; such a result would mean that the decision below (even though vacated for lack of finality) would cloud the further proceedings in the district court by leaving the district judge's status unresolved.

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January 19, 1988